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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Estate of ARTHUR H. MEIER, JR.,  
Deceased.

PATRICK J. HOOLIHAN, as Executor,  
etc.

Plaintiff and Respondent,

v.

JAMES WIENCEK et al., as Trustees, etc.,

Objectors and Appellants.

G040229

(Super. Ct. No. A236759)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Janet M. Christoffersen, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded.

Scott Sayre for Objectors and Appellants.

No appearance for Plaintiff and Respondent.

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THE COURT:<sup>\*</sup>

Without affording the trustees adequate notice and a meaningful opportunity to respond, the probate court made changes to testamentary special needs trust. The trustees argue the court exceeded its power in imposing these conditions and the changes are unnecessary under the facts. Because fundamental principles of due process demand that the trustees be given notice and a fair opportunity to address proposed court-ordered changes, we will reverse the order and remand the matter to the probate court for further hearing.

I

Arthur H. Meier, Jr., is deceased. His will creates a third party special needs trust for Thomas P. Wiencek who is autistic. It states that the purpose of this trust “is to provide financial aid that is supplemental to, rather than a replacement for, government benefits provided to the beneficiary, without disturbing government benefits that would be available to the beneficiary if the trust did not exist.” (See 1 Special Needs Trusts: Planning, Drafting, and Administration (Cont.Ed.Bar 2009) § 6.9, pp. 285-286.) They were not related but Meier had known Wiencek and his parents, the trustees, for many years.

Until the executor of the will filed his fourth and final account and petition for final distribution, the probate court had never questioned the terms of this special needs trust. Requests for distributions to it had been made and approved. But the court began the hearing on the fourth and final account with this announcement: “The only issue the court was concerned with in reviewing this was, upon further review of the special needs trust, it appeared that there were components of the trust that were lacking, and normally required under the court’s processes, so the court reviewed the trust, special needs trust terms, as set forth in the order of August 9, 2007, and made alterations to the

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<sup>\*</sup> Before Sills, P. J., Moore, J., and Fybel, J.

trust so that it would conform with the court's requirements for a special needs trust as well as those of the law generally."

The court stated its tentative "would be to approve your petition as supplemented; however, requiring modification to the special needs trust in conformance with the changes I've made on the prior order." The executor was surprised by this turn of events because, as he complained, he had not received notice of any proposed changes to the trust, even in the probate notes. When asked if he wished to be heard on the tentative anyway, he responded: "I don't know what the changes are." The executor was then shown the proposed changes, which the record suggests were handwritten interlineations by the court.

The court told the executor that the changes, including a requirement that the entire trust remain under court supervision, were those required by law. When the executor questioned what law the court was referring to, the court said the proposed changes were required by "Probate Code section 3604, when you create a special needs trust." The executor was troubled by the court's explanation and suggested Probate Code section 3604 only applied "in the instance when the special needs trust is being created by the court rather than through the testamentary disposition." The court responded: "Well, the court does have authority under Probate Code section 3604 when [] there are funds to be paid into the trust, and the party seeks approval of the court, the court has authority to review and confirm the provisions of the trust and modify if they believe it appropriate." The executor, still puzzled, again questioned the basis for the court's changes: "And 3604 does apply to a testamentary trust?" The court simply said: "This is a special needs trust."

The court further told the executor that these changes could be ordered whether the trustees consented or not because the changes were required by Probate Code section 3604 and the local probate court rules. What the local probate court rules are, or how they complement Probate Code section 3604, was never stated. After some haggling

by the executor over some of the proposed language, the probate court entered an order settling the fourth and final account and final distribution and imposing its proposed changes to the terms of the trust.

## II

The trustees appeal. Although they did not appear at the hearing, they are, as we discuss below, aggrieved by the order; thus, they have standing to appeal. The trustees raise two issues. First, they argue they were not given adequate notice of and a fair opportunity to respond to the proposed changes and request that the matter be returned to the probate court for a new hearing. Second, they argue a testamentary special needs trust is not governed by Probate Code section 3604 and thus the changes made to it are improper and will unfairly, and unnecessarily, burden the special needs trust financially as well as in other ways.

Like the trustees, we are puzzled by the probate court's statements that a testamentary special needs trust is gyved by Probate Code section 3604. Subdivision (a)(1) of that section provides in relevant part: "If a court makes an order under Section 3602 or 3611 that money of a minor or person with a disability be paid to a special needs trust, the terms of the trust shall be reviewed and approved by the court and shall satisfy the requirements of this section. The trust is subject to continuing jurisdiction of the court, and is subject to court supervision to the extent determined by the court." A reasonable reading of that section suggests it applies only when orders to fund the trust have been made pursuant to Probate Code sections 3602 (payment of money on compromise) or 3611 (payment of money pursuant to compromise or judgment). Neither section purports to deal with a testamentary special needs trust.

We recognize some courts apply the provisions of Probate Code section 3604 "in every case in which there is a request for judicial assistance in creating or funding" special needs trusts. (1 Special Needs Trusts, *supra*, § 9.26, p. 454.) Nothing in the record we have suggests any such request was made here. Such practice, moreover,

would appear to run counter to the expressed purpose of section 3604. In its 1992 comments to Probate Code section 3604, the Law Revision Commission explains: “The section permits personal injury damages or settlement proceeds for a disabled minor or incompetent person to be delivered to a trustee of a special needs trust.” (Cal. Law Revision Com. com., 53 West’s Ann. Prob. Code (2009 Supp.) foll. § 3604, p. 50; see also *Shewry v. Arnold* (2004) 125 Cal.App.4th 186, 194 [“when a court approves a settlement of an action to which an incompetent person is a party, the conservator may petition the court for an order that money owed to the incompetent person pursuant to the settlement not become part of the conservatorship estate, but instead be paid to a special needs trust established under Probate Code section 3604.”].) Even California Rules of Court, rule 7.903(a)(1), which governs the court administration of trusts, does not appear to bring testamentary special needs trusts under its umbrella. It expressly defines a “[t]rust funded by court order” as a “trust that will receive funds under Probate Code section 2580 et seq. (substituted judgment); section 3100 et seq. (proceedings for particular transactions involving disabled spouses or registered domestic partners); or section 3600 et seq. (settlement of claims or actions or disposition of judgment involving minors or persons with disabilities).” (See also 1 Special Needs Trusts, *supra*, § 5.1 et seq., pp. 242-275.)

We do not, however, need to resolve the question as to whether the probate court may through Probate Code section 3604 or by local probate court rule to impose these conditions. Nor do we intend to suggest what this court’s resolution would be if the question were ripe. The order must be reversed and the matter remanded for a further hearing because the trustees were not afforded a fair and reasonable opportunity to be heard as to the probate court’s proposed changes. The trustees have an interest in the orderly administration of the trust and the distribution of its funds. They are entitled to notice that the probate court intends to issue an order that affects those interests. This is even truer where, as here, the probate court had routinely approved prior distributions

from the trust without suggesting the Probate Code or any local probate court rule mandated imposition of these new conditions. Without any notice having been given of the proposed court-ordered changes, even in the probate notes, the trustees were deprived of fundamental due process and an opportunity to be heard.

It is insufficient to say there was no harm because the executor was there to represent the interests of the trustees. The trustees have their own statutorily-mandated and non-delegable standard of care to abide by. (See Prob. Code, § 16040.) If the probate court's order impinges on the orderly administration of the trust or places a financial burden on it that affects distribution of trust money, it is the fiduciary duty of the trustees, not the executor, which are implicated. Lack of notice, moreover, is a deprivation of due process and reversible per se. (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291-293 [failure to afford litigant opportunity to present case is reversible error per se.]) Even if the harmless error standard somehow applied because the executor was there (Code Civ. Proc., § 475), we note the executor did not receive adequate notice, either.

Accordingly, the order is reversed and the matter is remanded to the probate court to permit it to conduct further hearings, if necessary, consistent with the views expressed herein. No costs are awarded on appeal.